

**Noordzi Bin Mohd. Ismail v.
Bank Bumiputra Malaysia Berhad**

[1994] 1 CLJ

K.C. Vohrah J.

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NOORDZI BIN MOHD. ISMAIL

v.

**BANK BUMIPUTRA MALAYSIA
BERHAD**

HIGH COURT, ALOR SETAR

DATO' K.C. VOHRAH J.

[BANKRUPTCY NO. 29 - 1051 - 92]

19 SEPTEMBER 1993

BANKRUPTCY: Application to set aside bankruptcy notice - Senior Assistant Registrar allowing the application based on an issue which was not pleaded in the judgment debtor's affidavit in support of the application - Whether SAR can go behind the judgment on which the bankruptcy notice is founded to determine whether it was flawed or not - Application of s. 3(1)(i) of the Bankruptcy Act 1967 and rr. 94(1)(b), 95 of the Bankruptcy Rules 1969.

The Senior Assistant Registrar (the SAR) set aside the bankruptcy notice issued by the Court on the sole ground that the final judgment obtained by the judgment creditor against the judgment debtor was flawed because the amount shown in the final judgment had interest awarded upon interest.

On appeal, Counsel for the judgment creditor contended that it was wrong for the SAR to take an issue which was not pleaded in the affidavit filed by the judgment debtor for the purpose of setting aside the bankruptcy notice.

Held:

[1] The statutory provisions relating to the grounds for setting aside of a bankruptcy notice, namely s. 3(1) of the Bankruptcy Act 1967 (the Act), rr. 94(1)(b), 95 of the Bankruptcy Rules 1969 (the Rules) and Form 7 in the appendix to the Rules do not permit grounds which are outside the ambit of these provisions to be raised in the affidavit of the judgment debtor.

[2] At the hearing of the application to set aside the bankruptcy notice on an affidavit filed under Rule 95(1) of the Rules, the SAR should have confined herself to a consideration of only the grounds which were within the ambit of s. 3(1) of the Act and rr. 94(1)(b), 95 and Form 7 of the Rules and she should not have gone behind the judgment on which the notice is founded to determine whether it was flawed or not.

[SAR's order allowing the application of the judgment debtor set aside with costs].

a Cases referred to:

Re A Debtor (No. 30 of 1956) [1957] 2 All ER 216 at 218 (refd)

Re Easton, ex parte Dixon [1983] 10 Morr 111 (refd)

Re A Debtor (No. 21 of 1937) [1938] 2 All ER 824 (refd)

Re MSA Zachariah [1993] 3 CLJ 279 / [1993] 2 AMR 27 (refd)

b *Datuk Kheng Kim v. Malayan Banking Berhad [1993] 3 CLJ 324 / [1993] 2 AMR 30 1285 (refd)*

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i)

Bankruptcy Rules 1969, rr. 94(1)(b), 95

Bankruptcy Act 1914, s. 1(g) (UK)

Bankruptcy Rules 1952, rr. 137, 139 (UK)

c Other sources referred to:

Halsbury's Laws of England, 4th Edn., Vol. 3, Para 273

For the Judgment Debtor - N. Nakaretnam; M/s. Retanam & Associates

d *For Judgment Creditor - Hashim b Jahaya; M/s. Hoe & Ahmad Zaki*

JUDGMENT

K.C. Vohrah J:

The Senior Assistant Registrar (the SAR) set aside the bankruptcy notice issued by this Court at the request of the judgment creditor, on the sole ground that the final judgment obtained by the judgment creditor against the judgment debtor (and which formed the basis of the bankruptcy notice) was flawed because the amount shown in the final judgment had interest awarded upon interest.

f In the appeal before me, Counsel for the judgment creditor argued that, even if the amount showed that interest had been awarded upon interest and that the judgment was flawed, which he did not concede, it was wrong for the SAR to take an issue which was not pleaded in the affidavit filed by the judgment debtor for the purpose of setting aside the bankruptcy notice. My view is that the statutory provisions relating to the grounds for setting aside of a bankruptcy notice that is, s. 3(1)(i) of the Bankruptcy Act 1967 (the Act), rr. 94(1)(b), 95 of the Bankruptcy Rules 1969 (the Rules) and Form 7 in the appendix to the Rules do not permit grounds which are outside the ambit of these provisions to be raised in the affidavit of the judgment debtor.

g In the application before the SAR to set aside the bankruptcy notice, Counsel for the judgment debtor relied on the affidavit filed by the

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judgment debtor. It appeared to be filed under r. 95(1) of the Rules which states, *inter alia*, that “(the) filing of an affidavit shall operate as an application to set aside the bankruptcy notice.”

The reference to the affidavit in r. 95 is a reference to the affidavit which the debtor has to file in relation to and to raise grounds concerning any of the matters which are required to be endorsed in the bankruptcy notice under r. 94(1)(b). Rule 94(1)(b) reflecting the provisions of s. 3(1)(i) of the Act states that every bankruptcy notice shall be endorsed with an intimation to the debtor that if he has any counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar. Thus, the grounds which may be raised in the affidavit must relate to one or more of the matters intimated and this is made very clear by Form 7 in the Appendix to the Rules, though Form 7 appears to allow one other matter to be included, that is, that the judgment debt claimed by the creditor had been satisfied (with the nature of the satisfaction to be stated) but it does appear on the authority of *Re A Debtor*. (No. 30 of 1956) [1957] 2 All ER 216 at 218 that an application on the ground of satisfaction by affidavit as stated in Form 7 may not be appropriate.

In the present case, the judgment debtor averred in paragraph 4 of his affidavit that he had settled the debt but he did not condescend to details as to when and how it was settled. Suffice it to say the affidavit in reply of the judgment creditor demolishes that averment. In any event, Counsel for the judgment debtor did not rely on the averment in paragraph 4 when he appeared before the SAR.

There was another averment by the judgment debtor that he had a claim against the judgment creditor. The amount of the claim was, however, not stated. Its nature, whether it was a counterclaim, set off or crossclaim, was not stated nor was there any averment that he could not set up such claim in the action in which the judgment was obtained against him and here again, the averment of a claim by the judgment debtor in his affidavit can be ignored. In fact Counsel for the judgment debtor did not rely on it.

Then the affidavit of the judgment debtor touched on grounds which were not matters referred to

a in s. 3(1)(i) of the Act or r. 94(1)(b) and Form 7 viz., that neither the summons in respect of the civil action nor the judgment obtained against him was served on him (paragraph 3); that the bankruptcy notice was wrong in law (paragraph 2); that the application for the bankruptcy notice and the issue of the bankruptcy notice were not made in accordance with the Rules (paragraph 4). And, at the hearing of the application before the SAR, and at the appeal before me, another ground was raised, that the judgment on which the bankruptcy notice was based was flawed, there having apparently been interest charged upon interest in that judgment.

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c In England, before the Insolvency Act 1986 and the Insolvency Rules 1986 came into force, bankruptcy proceedings were governed by the Bankruptcy Act 1914 and the Bankruptcy Rules 1952. Rules 137, 139 and Form 9 of the said English Bankruptcy Rules are substantially similar to the corresponding Rules 94, 95 and Form 7 of the Malaysian Rules, except that whereas under r. 95(1) of the Malaysian Rules, on the filing of an affidavit (which operates as an application to set aside the bankruptcy notice), the Registrar shall fix a date for the hearing of the application, under English Rule 139(1), the Registrar would fix a date on being satisfied that sufficient cause was shown.

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e In *Halsbury's Laws* (4th Edn), Vol. 3, this is stated in a passage in paragraph 273 on the matter of the setting aside of a bankruptcy notice:

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On the hearing of the debtor's application to set aside a bankruptcy notice, the courts will not go behind the judgment on which the notice is founded, but is confined to the consideration of the alleged counterclaim, set-off or cross demand in the terms of the statutory provisions relating to it.

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There is a reference to s. 1(g) of English Bankruptcy Act 1914 (substantially similar to s. 3(1)(i) of the Malaysian Act) and rr. 137-139 of the English Bankruptcy Rules 1952 (which I previously referred to and which are substantially similar to rr. 94 - 95 of the Malaysian Rules). What should be highlighted is the principle mentioned in the passage, that an order setting aside a bankruptcy notice which the judgment creditor was entitled to issue, cannot, on such an application, be made on other grounds. The authority for this is stated as *Re Easton, ex Parte Dixon* [1983] 10 Morr 111 though there is a note made to compare a case decided in 1937,

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Re A Debtor (No. 21 of 1937) [1938] 2 All ER 824 but in that case the issue considered was one of nullity *ab initio* of the bankruptcy notice.

It is clear from the passage that there can be an application to set aside a bankruptcy notice on grounds other than those mentioned in the statutory provisions (for example, satisfaction of the judgment debt (see my previous reference to *Re A Debtor (No. 30 of 1956)*) or illegality) but such an application should be made by motion.

I think from the foregoing (see also *Re MSA Zachariah* [1993] 2 AMR 27) it is clear that at the hearing of the application to set aside the bankruptcy notice on an affidavit filed under r. 95(1), the SAR should have confined herself to a consideration of only the grounds which were within the ambit of s. 3(1)(i) of the Act and rr. 94(1)(b), 95 and Form 7 of the Rules, if any of the matters were raised and, if they were not, as in this case, she should not have gone behind the judgment on which the notice is founded to determine whether it was flawed or not.

In the circumstances, I reverse the order of the SAR allowing the application of the judgment debtor. Her order is set aside with costs.

As postscript, after I had delivered the above judgment, it was brought to my attention by Counsel for the judgment debtor that the Supreme Court in *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 2 AMR 30 1285, has touched on the matter of an affidavit filed in that case which failed to disclose that the debtor had a counterclaim, set off or cross demand and that the Supreme Court held that the affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act and the case should be treated as if no affidavit under r. 95 had in fact been filed.

PUBLIC PROSECUTOR

v.

LIM HONG CHIN

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CRIMINAL APPEAL NO. KG. 55
OF 1992 (I)]
4 SEPTEMBER 1993

CRIMINAL LAW & PROCEDURE: Section 294(i) of Criminal Procedure Code - 'Binding Over' order - Whether applicable to offences punishable with imprisonment or fine or with both.

The accused pleaded guilty to the charge of voluntarily assisting in the disposal of stolen property. After hearing the plea of mitigation the learned trial Magistrate made an order that the accused be bound over for a period of three years under the provisions of s. 294(i) of the Criminal Procedure Code (CPC).

The prosecution appealed against the order of the Magistrate contending that s. 294(i) of the CPC was not applicable having regard to the form of punishment provided for the offence charged in the Penal Code. The prosecution further contended that even if s. 294(i) of the CPC was applicable, it was wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration.

Held:

[1] If the legislature had intended to confine the application of the said s. 294(i) of the CPC to offences punishable with imprisonment only without the option of any alternative penalty, it would have expressly so enacted by using some appropriate words to that effect or by simply adding the word "only" in the appropriate place in the said s. 294(i) of the CPC.

[2] In any event, this being a penal law, the benefit of doubt of any uncertainty should be given to the subjects on whom the penalty is to be enforced and the provisions should be so construed that those persons who are or might reasonably be within it should not be excluded from it.

[3] In all the circumstances of the case there was no good reason for interfering with the discretion exercised by the learned trial Magistrate.

[Appeal dismissed].